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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 843

MARIE B. NICK,

Petitioner,

vs.

STATE HIGHWAY COMMISSION OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Marie B. Nick, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin made and entered in the above entitled case on November 26, 1963.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin sought to be reviewed (Appendix A, infra., pp. 18-24) is reported at 21 Wis. (2d) 489. The opinion of the Circuit Court for Dane County, Wisconsin, is unreported and is printed in (Appendix B, infra., pp. 26-29). The Order of the State Highway Commission denying petitioner's application for a driveway is unreported and is printed in (Appendix C, infra, pp. 30-32). The opinion of the Supreme Court of the State of Wisconsin, being a companion case, is printed in (Appendix D, infra, pp. 33-41) and reported at 13 Wis. (2d) 511.

JURISDICTION

The judgment of the Wisconsin Supreme Court was made and entered November 26, 1963. The jurisdiction of the Court is invoked under 28 U. S. C. 1257(3).

QUESTIONS PRESENTED

1. Did the hearing held by the State Highway Commission on August 20, 1951, as a result of which State Highway #30 was declared to be a controlled-access highway, affect access rights of abutting property owners who received no notice of said hearing, other than notice by publication?

2. Did the abutting property owners have the right to assume, following the order making state highway #30 a controlled-access highway, that upon future applications for driveways they would either be granted access, subject to reasonable regulation, or compensation, if access were prohibited?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV to United States Constitution.

Wisconsin Statute:

"84.25 Controlled-access highways. (1) Authority of Commission; Procedure. The legislature declares that the effective control of traffic entering upon or leaving intensively traveled highways, is necessary in the interest of public safety, convenience and the general welfare. The commission is authorized to designate as controlled-access highways the rural portions of the state trunk system on which, after traffic engineering surveys, investigations and studies, it shall find, determine and declare that the average traffic potential is in excess of 2,000 vehicles per 24-hour day. Such designation of a portion of any state trunk highway in any county as a controlled-access highway shall not be effected until after a public hearing in the matter shall have been held in the county courthouse or other convenient public place within the county following notice by publication once each week for 3 successive weeks in a newspaper published in the county, or if there be none, in a newspaper having general circulation in the county. If the commission shall then find that the average traffic potential is as provided by this subsection, and that the designation of the highway as controlled-access highway is necessary in the interest of public safety, convenience and the general welfare, it shall make its finding, determination and declaration to that effect, specifying the character of the controls to be exercised. Copies of the finding, determination and declaration shall be recorded with the register of deeds, and filed with the county clerk, and published in the newspaper in which the notice of hearing was published, and the order shall be effective on such publication. Not more than 500 miles of highway shall be designated as controlled-access highways under authority of this act.

"(4) Connections By Other Highways. After the establishment of any controlled-access highway, no street or highway or private driveway, shall be opened into or connected with any controlled-access highway without the previous consent and approval of the commission in writing, which shall be given only if the public interest shall be served thereby and shall specify the terms and conditions on which such consent and approval is given.

"(5) USE OF HIGHWAY. No person shall have any right of entrance upon or departure from or travel across any controlled-access highway, or to or from abutting lands except at places designated and provided for such purposes, and on such terms and conditions as may be specified from time to time by the commission.

"(6) ABUTTING OWNERS. After the designation of a controlled-access highway, the owners or occupants of abutting lands shall have no right or easement of access, by reason of the fact that their property abuts on the controlled-access highway or for other reason, except only the controlled right of access and of light, air or view.

"(8) RIGHT OF WAY. Any lands or other private or public property or interest in such property needed to carry out the purposes of this section may be acquired by the highway commission in the manner provided in section 84.09.

"Section 84.09 ACQUISITION OF LANDS AND INTERESTS THEREIN. (1) The state highway commission may acquire by gift, devise, purchase or condemnation any lands . . . or interests in lands. . . ."

STATEMENT

Petitioner is the owner of a parcel of land abutting to the north of Wisconsin State Highway No. 30, commonly known as the Blue Mound Road, a controlled-access highway which runs east and west, just west of the City of Milwaukee. The parcel has a frontage of 330 feet on the Blue Mound Road and extends back from the center of the highway 250 feet. The western end of the parcel is approximately 990 feet east of the Calhoun Road, a secondary highway which runs north and south, intersecting the Blue Mound Road.

In 1951, the Blue Mound Road had been declared by the State Highway Commission to be a controlled-access highway, following a hearing held on published notice only.

Petitioner and her husband purchased the property in 1955. At the time of the sale, the tract sold petitioner was part of a larger tract which extended west 990 feet to the Calhoun road. The tract sold petitioner abuts only on the Blue Mound Road but the original tract abutted on both the Blue Mound and Calhoun Road.

Under date of April 15, 1960, petitioner, then the surviving owner, made application to the State Highway Commission for a driveway permit to the Blue Mound Road from her property.

Under date of April 19, 1960, the Commission denied the request for the stated reason that the property was acquired subsequent to the controlled-access finding date of August 20, 1951. The denial further stated that access to petitioner's land via the Calhoun Road would have to be provided by the former owners.

Plaintiff thereupon brought an action for inverse condemnation, being an action for compensation, in the Circuit Court for Waukesha County.

The Circuit Court dismissed the action without hearing, holding that "petitioner purchased the parcel involved in this petition approximately six years after the original controlled-access order was issued, and took said parcel with actual or constructive knowledge that it fronted on a controlled-access highway."

Petitioner appealed to the Supreme Court.

On this appeal, petitioner's brief set forth the following:

> "The statute, Sec. 85.25, upon which the order was based does not give the Commission arbitrary power to prohibit. It states:
>
> > 'After the establishment of any controlled-access highway, no street or highway or private driveway, shall be opened into or connected with any controlled-access highway without the previous consent and approval of the commission in writing, which shall be given only if the public interest shall be served thereby and shall specify the terms and conditions on which such consent and approval is given.'
>
> "It is submitted that this means, not that right of access is prohibited; it means that it will be regulated. Abutting property owners wanting to open driveways into the Blue Mound Road will in the future have to apply to the Commission for driveway permits. The Commission can in the exercise of its police power regulate the number, location and width of the driveways. It cannot prohibit without the payment of compensation; if that were the power given the Commission, the statute on which the order is based would be unconstitutional as being in violation of Article 1, Section 13, of the Wis-

consin Constitution and Article 5 of the Amendments to the United States Constitution which reads in part:

'Nor shall private property be taken for public use, without just compensation.'

"It is submitted that the court would have pointed out that the property owner cannot determine in advance of his needing a driveway, and applying for it, and being refused, that he has been damaged. And it seems that the court would have held that it would not indulge in the presumption that on application being made that the Commission would act beyond the scope of its police powers. It is submitted that the court would have held that, if as the need arises and the property owner applies for a driveway and is refused, the action of the Commission is subject to judicial review. At that time the court will inquire into such matters as the safety requirements of the public and the nature and number of driveways in the vicinity.

"The Denial of Petitioner's Request Without Hearing Is in Violation of ArticleXIV of the Amendments to the United States Constitution Which Reads in Part; 'Nor Shall Any State Deprive Any Person of Life, Liberty or Property Without Due Process of Law

"Petitioner submits that this is true for the reasons stated under Heading III. There is the further reason that notifying a property owner by publication that in the future the highway abutting his property will be a controlled-access highway does not put him on notice that the Commission can thereby arbitrarily, and without the possibility of judicial review, deprive him of a valuable property right without compensation being paid.

"Especially is this true where Sec. 84.25(8) by reference to Sec. 84.09 makes provision for the pur-

chase or condemnation of property interests needed to carry out the purposes of the section. The property owner is not likely nor can he object to the highways being declared to be a controlled-access highway when it makes provision for paying him for any property interest needed to be acquired."

The Supreme Court affirmed the decision of the Circuit Court. *Nick v. State Highway Comm.* (1961) 13 Wis. (2d) 511, 109 N.W. (2d) 71. (Appendix D)

On motion for rehearing, the Supreme Court held that section 227.15 (Wis. Stats.) and the sections immediately following, provide for judicial review of administrative decisions, "that such review is available to this appellant and *the remedy so provided* is the exclusive remedy. . . ."

> "Sec. 227.15 Stats. and the sections immediately following provide for judicial review of administrative decisions. Respondent submits that such review is available to this appellant and the remedy so provided is the exclusive remedy. Appellant acknowledges that she may have this remedy but it will not produce any money in compensation for the property rights which she alleges have been seized; wherefore she submits that she may submit another remedy better adopted to her desire.
>
> "We hold that the relief of judicial review of the administrative decision provided by statute is the exclusive remedy, with right of appeal from the reviewing court to the Supreme Court, per sec. 227.21. Appellant did not exhaust her remedy of judicial review. The circuit court correctly dismissed appellant's proceeding for other relief."

No review was requested of the United States Supreme Court for the reason that petitioner interpreted the decision as not finally settling the controversy between the

parties but leaving the plaintiff to her right to apply for a driveway and applying for judicial review if denied.

Petitioner thereupon applied again for a driveway, stating that the application was "made having in mind the recent decision of the Wisconsin Supreme Court" and that since "judicial review of administrative decisions under Chapter 227, Wisconsin Statutes, are based on the record made at the hearing on the application, it is petitioner's position . . . that this application should not be denied without a hearing."

Petitioner in the application further stated that at the hearing she would offer proof showing the following:

> "1. In other parts of the state, the Commission is paying for access rights even though the property owner is permitted to continue to have direct access to the highway.
>
> "2. The Commission is paying for access rights to the main highway even though the property has access to the main highway by a secondary highway, as in the Nick case.
>
> "3. The Commission has granted driveway permits to the Blue Mound Road in the immediate vicinity of petitioner's property, since the controlled-access order went into effect.
>
> "4. Driveways exist up and down the highway on both sides of petitioner's property, in most instances at an average of every two or three hundred feet." (Record pp. 109-110)

Under date of February 8, 1962, the Commission denied the application for a driveway and the request for a hearing. The findings of the Commission state that State Trunk Highway 30 was declared a controlled-

access highway on August 7, 1951, and "that this finding and decision, as it affected the above said frontage was not appealed by the said property owner under sec. 227.15, Wis. Stats., nor was there a request for a reconsideration of the decision of the property owner." (Record p. 123) (Appendix C, p. 31)

The Circuit Court, on petition for review, held "that the controlled-access order entered by the Highway Commission in 1951 was valid and that: 'The time to review the Commission's procedure and determination (of compensable property rights has) long since expired. . . .'" (Record p. 101) (Appendix B, p. 26)

On this appeal, the federal questions sought to be reviewed were raised in petitioner's brief as follows:

> "Property owners were not adversely affected by the Order of 1951 declaring State Highway 30 to be a controlled-access highway since the controlled-access statute makes adequate provision for compensation.
>
> "Section 84.25(8) provides:
>
> > 'Any lands of other private or public property or interest in such property needed to carry out the purposes of this section may be acquired by the highway commission in the manner provided in section 84.09.'
>
> "Section 84.09 authorizes the Commission to acquire lands and interests therein by 'gift, devise, purchase or condemnation.'
>
> "Supposing a property owner had appealed from the order of 1951. All that the order did was to declare that highway 30 was a controlled-access highway. He could not ask that that order be set aside. The Commission under the statute has the power to make the order.

"He could not claim that there had been a taking of his property within the purview of the 5th and 14th Amendments to the United States Constitution or of Art. 1, Sec. 13 of the State Constitution. Would not the court have pointed out that the property owner, by the order declaring highway 30 to be a controlled-access highway, could not tell if his property rights were affected? If he subsequently applied for a driveway and his application were granted, he would have no cause for complaint. If his application were denied, the statute makes provision for compensation.

"We submit that it would have been premature for the property owner to have appealed from the mere order declaring State Highway 30 to be controlled-access highway. All that could have been considered on that appeal is the authority of the Commission to make the order. No property rights were affected at that time. The statute making provision for the hearing, sec. 84.25(1), does not contemplate that rights of abutting property owners shall be affected since it makes no provision for serving notice on any property owners.

"The wording of the published notice of hearing is not such as to put property owners on notice that their property rights may be affected; 'Persons interested are invited to attend and express their views in the matters.'

"The case is similar to that of Martin v. Creasy 360 U.S. 219, 79 Sup. Ct. 1034. The district court had enjoined the state from proceeding to declare a highway a limited-access highway on the ground that the Pennsylvania Legislature did not intend to compensate abutting land owners whose right of access to an existing highway is destroyed by the designation of that highway as a limited-access highway.'

"The Supreme Court in reversing the district court stated:

> 'It was the clear pronouncement of the Pennsylvania courts that the State Statute provides a complete procedure to guard and protect the plaintiff's constitutional rights at all times. In the light of this pronouncement it is difficult to perceive the basis for the District Court's conclusion that the plaintiffs would be irreparably harmed unless the state officers were enjoined from proceeding under the statute. There is no question here of the State's right to create or designate a limited-access highway. The only question is the plaintiff's right to compensation. It must be assumed that the courts of Pennsylvania meant what they said in stating that the plaintiffs will be afforded a procedure through which the full measure of their rights under the United States Constitution will be preserved.'

"In the instant case the property owner had every right to make that assumption and not appeal from the order making the highway a controlled-access highway since the statute specifically provides for compensation.

> "The hearing to determine if state highway 30 should be declared to be a controlled-access highway was not intended to affect property rights of abutting property owners since the statute makes no provision for serving notice on such owners nor was such notice served.

"Section 84.25(1), on this point, merely provides:

> 'Such designation of a portion of any state trunk highway in any county as a controlled-access highway shall not be affected until after a public hearing in the matter shall have been held in the county courthouse or other convenient public place within the county following notice

by publication once each week for 3 successive weeks in a newspaper published in the county, or if there be none, in a newspaper having general circulation in the county.

"Later, when the Commission made general grants of driveways to property owners who had driveways prior to the order, they gave personal notice to such owners so that they knew the limitations of their rights. No notice whatever was given to property owners, such as plaintiff's predecessor in title, who had not had driveways prior to the entry of the order.

"Failure to give notice would be a violation of the 5th and 14th Amendment to the U. S. Constitution if the order were intended to affect such property owner's rights. Clearly, it was not intended. His rights would be first affected when he made application for a driveway and was denied. He should not assume there will be a denial without just compensation."

The Wisconsin Supreme Court decided as follows with respect to right to compensation and the sufficiency of the notice given of the hearing held to determine whether state highway 30 should be declared to be a controlled-access highway:

"Notice of the hearing was given by publication pursuant to sec. 84.25(1), Stats. The statutory notice provisions were reasonably calculated to apprise interested parties of the impending action. See 1 Merrill, Notice, pp. 510, 511, sec. 518."

"Mrs. Nick argues that an abutting owner would not be concerned about the 1951 public hearing or disturbed by the absence of individual notice for the reason that the owner would expect to receive compensation if his property rights were later affected by the denial of a driveway permit. We are

unable to accept this theory of a continuing, dormant right to challenge the propriety of the original hearing. The mistaken expectation of compensation did not give the landowner the right to take a belated appeal from the 1951 hearing. As we said in the previous Nick case, at page 518a:

> 'We hold that the relief of judicial review of the administrative decision provided by statute is the exclusive remedy, with right of appeal from the reviewing court to the supreme court, per sec. 227.21, Stats. Appellant did not exhaust her remedy of judicial review.'

"Mrs. Nick can hardly complain because she did not get notice of the 1951 hearing; she did not acquire any interest in the real estate until over four years after the hearing. She knew or should have known of the status of Highway 30 at the time of her purchase. Since her predecessor in interest did not appeal the commission's decision, the circumstances of the hearing in 1951 can be of no benefit to Mrs. Nick in her present claim for a driveway permit. In the earlier Nick case, at page 515, we said:

> 'The time to review the commission's procedure and determination long since expired and those questions were not before the trial court nor before this court. The only question properly before the court is the question of whether Reinders' grantee, the petitioner, has a right to compensation for the restriction of direct access from her property to Highway 30.'"

REASONS FOR GRANTING THE WRIT

I

In the briefs and arguments before the Wisconsin Supreme Court, petitioner specially claimed rights and privileges under the 5th and 14th Amendments to the United States Constitution.

Whether petitioner has been deprived of property without due process of law, or her property taken for public use, without just compensation, depends in the first instance on whether the right of access is a property right.

The following argument was made in petitioner's brief in the first *Nick* case and incorporated by reference in her brief in the second *Nick* case:

> "Wisconsin has recognized the Rule of Real Property at least as far back as Johnston v. Lonstorf, 128 Wis. 17, 107 N.W. 459 (1906) and as recently as Royal Transit, Inc. v. West Milwaukee, 266 Wis. 271, 63 N.W. (2d) 62 (1953) that the right of access cannot be prohibited without compensation being paid, even though access is available by another high way on which the property also abuts."

In the *Royal Transit* case, *supra*, the property fronted a distance of 286 feet on South Thirty-ninth Street. It also abutted on the north end of South Fortieth Street where the street dead-ended at Royal Transit's property. The City adopted an ordinance restricting South Fortieth Street against heavy traffic and erected a barrier which had the effect of denying the property owner access to the street.

It was argued in the Brief for the City of West Milwaukee:

> "There is plenty of access to plaintiff's land at its front end, where it has 267.12 feet frontage on South 39th Street."

and again:

"All of these persons have ready access to plaintiff's offices and buildings over South 39th Street close to which plaintiff's office and other buildings are located."

The Wisconsin Supreme Court held:

"There remains the question whether appellant has the right under its police power to erect and maintain the barrier in question. We hold that respondent cannot be deprived of the right of access to its property from the north end of South Fortieth Street. While it is true that such right is subject to reasonable regulations under the police power of the village, it cannot by virtue of such power of regulation be prohibited."

Other recent state cases to the same effect cited in petitioner's brief before the Wisconsin Supreme Court are: *Florida State-Turnpike Authority v. Anacho Corp.*, 116 So. (2d) 8, (1959); *State v. Thelberg* (Ariz) 350 P 2d 988, (1960); *Golden v. Louisville & N. R. Co.*, 228 Ky. 134, 14 S.W. 2d 379

It is submitted that if the right of access is a property right, it cannot, under the 14th Amendment to the United States Constitution be taken from the owner by a hearing held on published notice only, the property owner being available, and without compensation being paid.

Whatever rights petitioner's predecessor in title had in the property passed to her on the sale. If he had not lost his rights because of insufficiency of notice and because of no compensation being paid, neither has petitioner.

It seems to petitioner that the situation that was contemplated in *Martin v. Creasy*, 360 U. S. 219, 79 Sup.

Ct. 1034, might develop has developed here. In that case the court ended by stating:

> "If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here."

CONCLUSION

The error running through these proceedings from the beginning is the idea that failure to appeal from the controlled-access order of 1951 froze the property owner's rights at that time. No order was entered denying petitioner's predecessor in title access. Paragraph 4 of the Minutes of the State Highway Commission refers to the order declaring state highway #30 to be a controlled-access highway and not to any order specifically affecting this property. (Appendix C, p. 31) *Martin v. Creasy*, supra, was cited and quoted from at length by counsel in both cases.

WHEREFORE your petitioner prays that a writ of certiorari issue to the Supreme Court of the State of Wisconsin.

Dated February 6, 1964.

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APPENDIX A

NICK, Appellant, v. STATE HIGHWAY COMMISSION, Respondent.

October 30—November 20, 1963.

APPEAL from a judgment of the circuit court for Dane county: NORRIS E. MALONEY, Circuit Judge. *Affirmed.*

This is an appeal by Marie Nick from a judgment which dismissed a petition for review of an administrative decision. The instant litigation is a continuation of a dispute between Mrs. Nick and the State Highway Commission; they have been in this court before. See *Nick v. State Highway Comm.* (1961), 13 Wis. (2d) 511, 109 N.W. (2d) 71.

On August 20, 1951, the State Highway Commission, pursuant to the authority vested in it by sec. 84.25, Stats., declared Highway 30 to be a controlled-access highway. The record discloses that there was a public hearing held prior to such declaration and that previously there had been published notices in a Waukesha newspaper of such hearing, all in accordance with sec. 84.25(1). Mrs. Nick's property in dispute was purchased by her from Mr. Reinders on December 30, 1955. It is bounded on the west by a highway called the Calhoun road, and it is bounded on the south by Highway 30, frequently called the Blue Mound road.

On April 15, 1960, the petitioner applied to the commission for a driveway permit from her property to Highway 30, and such permission was denied on April 19, 1960. She then filed with the circuit court for Waukesha county a petition for inverse condemnation. The circuit court denied the petition for inverse condemnation, and this court sustained the circuit court.

The instant litigation results from an application for a driveway permit made by Mrs. Nick on November 14, 1961. As the circuit court found, this application was denied without a hearing but upon expansive findings of fact culminating in the determination that additional points of access to the petitioner's property were not in the public interest because of the traffic count on Highway 30 and because of traffic signals at the intersection of Highway 30 and Calhoun road. The commission's denial of the application was also based upon the conclusion that any additional access points would be hazardous to the traveling public. Mrs. Nick concedes on this appeal that she has indirect access to Highway 30.

The circuit court rendered judgment dismissing, on the merits, Mrs. Nick's petition for review of the commission's denial of her application for a driveway permit, and judgment was entered on March 15, 1963. Mrs. Nick has appealed such judgment to this court under the provisions of sec. 227.21, Stats.

Statutes Involved.

"84.25 CONTROLLED-ACCESS HIGHWAYS. (1) *Authority of commission; procedure.* The legislature declares that the effective control of traffic entering upon or leaving intensively traveled highways is necessary in the interest of public safety, convenience and the general welfare. The commission is authorized to designate as controlled-access highways the rural portions of the state trunk system on which, after traffic engineering surveys, investigations and studies, it shall find, determine and declare that the average traffic potential is in excess of 2,000 vehicles per 24-hour day. Such designation of a portion of any state trunk highway in any county as a controlled-access highway shall not be effected until after a public hearing in the matter shall have been

held in the county courthouse or other convenient public place within the county following notice by publication once each week for 3 successive weeks in a newspaper published in the county, or if there be none, in a newspaper having general circulation in the county. If the commission shall then find that the average traffic potential is as provided by this subsection, and that the designation of the highway as a controlled-access highway is necessary in the interest of public safety, convenience and the general welfare, it shall make its finding, determination and declaration to that effect, specifying the character of the controls to be exercised.

"(4) *Connections by other highways.* After the establishment of any controlled-access highway, no street or highway or private driveway, shall be opened into or connected with any controlled-access highway without the previous consent and approval of the commission in writing, which shall be given only if the public interest shall be served thereby and shall specify the terms and conditions on which such consent and approval is given.

"(6) *Abutting owners.* After the designation of a controlled-access highway, the owners or occupants of abutting lands shall have no right or easement of access, by reason of the fact that their property abuts on the controlled-access highway or for other reason, except only the controlled right of access and of light, air or view."

For the appellant there was a brief by *Walstead, Anderson, Bylsma & Eisenberg* of Madison, and oral argument by *Elliott N. Walstead.*

For the respondent the cause was argued by *A. J. Feifarek*, assistant attorney general, with whom on the brief was *George Thompson*, attorney general.

GORDON, J. In *Nick v. State Highway Comm.* (1961), 13 Wis. (2d) 511, 109 N.W. (2d) 71, this court held that an impairment of the use of property by the exercise of the police power, where the property itself is not taken by the state, does not entitle the owner of such property to compensation. It was noted that Mrs. Nick still had access to Highway 30 via the use of Calhoun road.

The court relied on the reasoning of *Carazalla v. State* (1955), 269 Wis. 593, 608b, 70 N.W. (2d) 208, 71 N.W. (2d) 276, which was also a controlled-access highway case. In *Carazalla* this court approved the conclusion of text writers that if no land is taken for the converted highway but an abutting landowner's access to the highway is merely made more circuitous, no compensation should be paid. *Stefan Auto Body v. State Highway Comm.*, ante, p. 863, 000 N.W. (2d) 000.

In the present proceedings, Mrs. Nick seeks a permit to construct a driveway from her property to Highway 30. The commission denied her application without a formal hearing, asserting that any additional access points would not be in the public interest. Mrs. Nick believed that she was entitled to a hearing and appealed to the circuit court. That court dismissed her petition for review of the commission's determination, and we are in accord with that judgment.

In 1951, prior to the time of Mrs. Nick's acquisition of the property in question, the State Highway Commission declared Highway 30 to be a controlled-access highway. Mrs. Nick's predecessor in interest, Mr. Reinders, had the same opportunity which was available to all other interested parties to challenge the designation of Highway 30 as a controlled-access highway at a public hearing.

Notice of the hearing was given by publication pursuant to sec. 84.25(1), Stats. The statutory notice provisions were reasonably calculated to apprise interested parties of the impending action. See 1 Merrill, Notice, pp. 510, 511, sec. 518.

Mrs. Nick argues that an abutting owner would not be concerned about the 1951 public hearing or disturbed by the absence of individual notice for the reason that the owner would expect to receive compensation if his property rights were later affected by the denial of a driveway permit. We are unable to accept this theory of a continuing, dormant right to challenge the propriety of the original hearing. The mistaken expectation of compensation did not give the landowner the right to take a belated appeal from the 1951 hearing. As we said in the previous *Nick Case*, at page 518a:

> "We hold that the relief of judicial review of the administrative decision provided by statute is the exclusive remedy, with right of appeal from the reviewing court to the supreme court, per sec. 227.21, Stats. Appellant did not exhaust her remedy of judicial review."

Mrs. Nick can hardly complain because she did not get notice of the 1951 hearing; she did not acquire any interest in the real estate until over four years after the hearing. She knew or should have known of the status of Highway 30 at the time of her purchase. Since her predecessor in interest did not appeal the commission's decision, the circumstances of the hearing in 1951 can be of no benefit to Mrs. Nick in her present claim for a driveway permit. In the earlier *Nick Case*, at page 515, we said:

> "The time to review the commission's procedure and determination long since expired and those questions were not before the trial court nor before this

court. The only question properly before the court is the question of whether Reinders' grantee, the petitioner, has a right to compensation for the restriction of direct access from her property to Highway 30."

Thus, Mrs. Nick has no current right to a hearing based upon the 1951 action on the part of the commission. Further, the statutes do not provide for a hearing upon her current application for a permit to build a driveway. There is nothing in sec. 84.25, Stats., which would authorize the hearing she seeks, nor can she qualify under sec. 227.01(2). In the latter statute, the reference to a "hearing required by law" presupposes either (1) a hearing expressly provided for by the regulating statute or administrative rule, or (2) a hearing necessitated constitutionally by the requirements of due process.

If there were allegations of fraud or corruption on the part of the Highway Commission, due process would require a full hearing on such issues; court review of the record would also be available to fulfil the requirements of due process. However, mere inconsistency on the part of the commission is not sufficient to necessitate a hearing. An administrative agency is not bound by its prior determinations. In *Chicago, M., St. P. & P. R. Co. v. Public Service Comm.* (1954), 267 Wis. 402, 422, 423, 66 N.W. (2d) 351, an order of the public service commission was challenged on the ground that it was "arbitrary and capricious" because of alleged inconsistencies with its prior orders. The court in that case said, at page 422:

> "However, it is not within our province to determine whether the findings of the commission here are consistent with those made by it in another case."

See 2 Davis, Administrative Law Treatise, p. 528, sec. 17.07.

Mere inconsistency on the part of an administrative agency does not of itself rise to the dignity of a violation of the constitutional right to equal protection before the law. The United States supreme court, in *Snowden v. Hughes* (1943), 321 U.S. 1, 8, 64 Sup. Ct. 397, 88 L. Ed. 497, said:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. . . . But a discriminatory purpose is not presumed, . . ."

In our opinion, the inconsistencies averred by Mrs. Nick do not warrant the holding of a plenary hearing in order to comply with due process or equal protection of the law. If the petitioner's claim of arbitrary action on the part of the commission were sufficient to necessitate a judicial-type hearing, the commission would have a virtually impossible task of fulfilling the legislative responsibilities delegated to it by law. See *Ashwaubenon v. State Highway Comm.* (1962), 17 Wis. (2d) 120, 115 N.W. (2d) 498.

By the Court.—Judgment affirmed.

WILKIE, J.: took no part.

APPENDIX A(1)

And afterwards to-wit on the 26th day of November, A. D. 1963, the same being the 46th day of said term, the following proceedings were had in words and figures following, that is to say:

MARIE B. NICK,

Appellant,

v.

STATE HIGHWAY COMMISSION OF WISCONSIN,

Respondent.

This cause came on to be heard on appeal from the judgment of the Circuit Court for Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court for Dane County, appealed from in this cause, be, and the same is hereby, affirmed.

APPENDIX B

MEMORANDUM DECISION IN STATE OF WISCONSIN SUPREME COURT

Dated January 29, 1963

If persistence is a virtue, plaintiff and her attorneys are proper candidates for sainthood.

In the briefs first filed in this case, plaintiff's entire argument was that plaintiff should be entitled to compensation because of the Highway Commission's denial of her application under Sec. 84.25(4) Stats., for a driveway access to a "controlled-access" highway. This argument was nothing more nor less than a request to this Court to reverse the Supreme Court's decision in *Nick vs. State Highway Comm.*, (May, 1961) 13 Wis. 2d 511, 109 N.W. 2d 71. In that decision the Supreme Court decided that the controlled-access order entered by the Highway Commission in 1951 was valid and that: "The time to review the Commission's procedure and determination (of compensable property rights has) long since expired * * *," as to the 1320 feet of frontage on Bluemound Road lying to the east of Calhoun Road, and the Court specifically held that no new property rights were acquired by plaintiff through the purchase in 1955 of the easternmost 330 feet of such frontage.

At the time of the oral argument in this case on July 9, 1962, the Court informed the parties that no further consideration of compensable property rights in respect to the 1951 controlled-access order would be considered by this Court, and that under no circumstances would this Court entertain the idea of attempting to reverse the Supreme Court.

The latest application for a driveway to the Bluemound Road, which is here under consideration, was dated No-

vember 14, 1961. (Previous applications were denied in 1957 and on April 19, 1960.) The November 14, 1961 application was denied without hearing, but upon expansive findings of fact culminating in the determination "that additional points of access to the above said frontage are not in the public interest, because of the traffic count on said highway and the traffic signals at the intersection of State Trunk Highway 30 and Calhoun Road, and that any additional access points would be hazardous to the traveling public and not in the public interest * * *." (Plaintiff's vendor at the time of the sale in 1955 had access to Calhoun Road, but this record is silent as to whether or not plaintiff has ever asserted her rights to a right of way of necessity across vendor's property to Calhoun Road.)

At the time of oral argument the Court requested further briefing on: "The question of whether or not this case is a 'contested case' under Sec. 227.01 Stats., and if not a contested case, is it such a case that the due process of law nevertheless requires that there be a trial-type of hearing before the Highway Commission. * * *."

The rules of "fair play" as found in Chap. 227 that require trial-type hearings with findings of fact and conclusion of law, are by definition of Sec. 227.01(2) applicable only to "contested cases" in which "the law already requires an opportunity for hearing to be offered. The Procedure Act, Chap. 227, does not itself specify or determine what types of cases require a hearing; that is a matter which is left for the specification in the particular regulatory act which the agency administers." *Park Building Corp. vs. Ind. Comm.*, (1960) 9 Wis. 2nd 78, 92, 100 N.W. 2d 571.

Sec. 84.25 provides that there must be a hearing before the Highway Commission enters its original order for

a controlled-access highway, but subsection (4) providing for applications for driveways onto a controlled-access highway contains no provision for a hearing, and the granting or denial of such application is vested exclusively in the legislative discretion of the Commission, the only statutory proscription being that no such driveway shall be granted unless it is in "the public interest." The property owner's desire to add new value to his property by virtue of the driveway may be incidentally considered as a part of the public interest, but such private pecuniary desire is not a primary consideration. The primary consideration as set forth in Sec. 84.25(1) is "the interest of public safety, convenience and the general welfare."

Plaintiff argues that the denial of the application for a driveway "takes property from the plaintiff." The premise of this argument is false; whatever property rights plaintiff or her predecessor ever had were taken under the police power in 1951, and no compensation was due the land-owner merely because his access to the highway was made more circuitous. *Carazalla vs. State*, (1955) 269 Wis. 593, 608-b, 70 N.W. 2d 208, 71 N.W. 2d 276. The only proper time to assert a contention that the controlled-access order exceeded the police powers and constituted a taking under eminent domain was by a Chap. 227 review of the original 1951 order which by statute had to be preceded by a public hearing.

Plaintiff's application for a driveway is an attempt to acquire a new right and not to protect an existing property right.

> "Where the purpose of an administrative determination is to decide whether a right of privilege which an applicant does not possess shall be granted to him or withheld in the exercise of a discretion

vested by statute, or where the power exercised is essentially administrative or executive and not judicial or quasi-judicial, notice and hearing is not necessary in the absence of an express or implied statutory provision therefor, and a statute may provide for such determinations without requiring notice and hearing." *42 Am. Jur. 474.*

"Many judicial opinions assert that a party is not entitled to a hearing when only a 'privilege' is involved, as distinguished from a 'right' or a 'legal' right.'" *1 Administrative Law Treatise* (Davis) 453.

Plaintiff may make as many applications as she chooses for a driveway, but she is not entitled to a trial-type of hearing before the Highway Commission.

The granting or denial of an application for a driveway to a controlled-access highway is a legislative matter, and there being no property rights involved, a trial-type hearing need not be granted. *Town of Ashwaubenon vs. State Highway Comm.*, (June 5, 1962) 17 Wis. 120, 127, 115 N.W. 2d 498.

Counsel for respondent State Highway Commission may prepare the appropriate judgment, dismissing the petition, submitting the same to opposing counsel five days before presenting it to the Court for signature.

Dated this 29th day of January, 1963.

APPENDIX C

(FROM THE MINUTES OF THE STATE HIGHWAY COMMISSION MEETING OF FEBRUARY 2, 1962)

12. CONTROLLED-ACCESS PROJECT CA 016-1(1)—WATERTOWN-MILWAUKEE ROAD — WAUKESHA COUNTY:

There was presented for Commission consideration a request that a hearing be granted on an application for a driveway to the property of Mrs. Marie B. Nick located on the northerly side of State Trunk Highway 30 in the northwest one quarter of the southwest one quarter of Section 27, Township 7 North, Range 20 East, Waukesha County.

The Commission duly considered the application for a driveway and the request for a hearing relating thereto, and made the following findings of fact and conclusions of law:

1. The Commission finds that State Trunk Highway 30, also known as the Blue Mound Road, between C.T.H. "SS" and the Milwaukee County line was declared a controlled-access highway under Sec. 84.25, Wis. Stats., on August 7, 1951, and that said declaration was effective on publication date of August 20, 1951;

2. That Edward A. Reinders was the owner of approximately 1320 feet of frontage on the northerly side of State Trunk Highway 30 in the northwest one quarter of the southwest one quarter of Section 27, Township 7 North, Range 20 East, Waukesha County;

3. That the frontage described in Paragraph 2 above was denied all access to State Trunk Highway 30 because there were no existing driveways to State Trunk Highway 30 at the time of the declaration of controlled access, and the premises were provided with alternate access on Calhoun Road, which the Commission found to be reasonable access

to State Trunk Highway 30 when considering the effect on the parcel as a whole;

4. That this finding and decision, as it affected the above said frontage, was not appealed by the said property owner under Sec. 227.15, Wis. Stats., nor was there a request for a reconsideration of the decision by the property owner;

5. That there were many requests made for driveways to the above said frontage, all of which were denied;

6. That on the 30th day of December, 1955, George Nick and Marie B. Nick purchased 330 feet of the above said frontage, 990 feet east of Calhoun Road, which was the alternate access;

7. That an application for a driveway was made by George Nick on October 23, 1957, that the application was denied on the 13th day of November, 1957, and that the applicant was notified of said denial on November 25, 1957;

8. That a similar request was made to the Highway Commission district office on April 15, 1960, which request was denied on April 19, 1960;

9. That a request for a hearing on an application, dated November 14, 1961, was received by the Commission, and the petitioner pleads that at the hearing she would offer proof showing the following:

(1) In other parts of the state, the Commission is paying for access rights even though the property owner is permitted to continue to have direct access to the highway.

(2) The Commission is paying for access rights to the main highway even though the property has access to the main highway by a secondary highway, as in the Nick case.

(3) The Commission has granted driveway permits to the Blue Mound Road in the immediate vicinity of petitioner's property, since the controlled-access order went into effect.

(4) Driveways exist up and down the highway on both sides of petitioner's property, in most instances at an average of every two or three hundred feet;

10. That the Commission finds and determines that the petitioner in her application has made no showing that an additional access point to State Trunk Highway 30 is in the public interest, as per Sec. 84.25(4), Wis. Stats., and the Commission finds and determines that additional points of access to the above said frontage are not in the public interest, because of the traffic count on the said highway and the traffic signals at the intersection of State Trunk Highway 30 and Calhoun Road, and that any additional access points would be hazardous to the traveling public and not in the public interest;

11. That the petitioner makes no showing of public interest, and therefore the request for hearing is denied and the application for a driveway to the petitioner's property is denied.

It was moved and seconded, public interest not being served thereby, that the application for a driveway and request for a hearing be denied and that a certified extract copy of this action be furnished the applicant. Carried.

I, V. L. Fiedler, Secretary of the State Highway Commission of Wisconsin, do hereby certify that the foregoing is a true and exact copy of that portion of the official minutes of the State Highway Commission meeting of February 2, 1962, relating to Controlled-access Project CA 016-1(1), Waukesha County.

V. L. Fiedler Secretary
State Highway
Commission of
Wisconsin

Dated at Madison, Wisconsin,
this 7th day of February, 1962.

APPENDIX D

NICK, Appellant, v. STATE HIGHWAY COMMISSION, Respondent.

April 5—May 2, 1961.

APPEAL from an order of the circuit court for Waukesha county: CLAIR H. VOSS, Circuit Judge. *Affirmed.*

Proceeding by petition to recover compensation from the state which has restricted petitioner's direct access from her lands to State Highway 30. The court denied the petition and petitioner has appealed.

The briefs give several different dates for a single event but the discrepancies are immaterial to the issues so no effort is made to determine which dates are accurate. The dates selected for use in the opinion are chosen for convenience.

The facts will be stated in the opinion. Where the word "commission" is used without modification it refers to the State Highway Commission.

For the appellant there was a brief and oral argument by *Elliot N. Walstead* of Milwaukee.

For the respondent the cause was argued by *A. J. Feifarek*, assistant attorney general, with whom on the brief was *John W. Reynolds*, attorney general.

BROWN, J. On and before August 20, 1951, one Reinders owned a tract of farmland in Waukesha county. It is 1,320 feet square and is bounded on the west by a highway called Calhoun road, and on the south by State Highway 30, generally called the Blue Mound road. There have never been driveways leading from this parcel into Highway 30 and there is no evidence that per-

sons came, by vehicle or otherwise, directly from the Reinders' tract onto Highway 30.

On August 20, 1951, the State Highway Commission, pursuant to authority granted it by sec. 84.25, Stats., declared Highway 30 to be a controlled-access highway. This forbade direct access from Reinders' land to Highway 30. Instead, thereafter, traffic between Reinders' property and Highway 30 must go via Calhoun road and its intersection with Highway 30.

On December 30, 1955, Reinders sold part of his land to petitioner and her husband, now deceased, being a parcel of 330 feet frontage on Highway 30 and 250 feet in depth. This parcel is distant 990 feet east of Calhoun road. Reinders retained the intervening land. On April 15, 1960, petitioner applied to the commission for a driveway permit from her property to Highway 30, which permission was denied on April 19, 1960. She then filed with the circuit court for Waukesha county this petition for inverse condemnation against the commission and prayed the court to assign this matter to the county condemnation commissioners to appraise and determine the value and interest in land alleged to be taken and the damages sustained by the petitioner by reason of the action taken by the State Highway Commission.

The parties agreed to have the circuit court determine the issues upon briefs and upon the facts shown by the record. Upon receipt and consideration of the briefs the court concluded:

"6. It is the opinion of the court that, if the petition is granted, the entire purpose of the controlled-access law would be circumvented and become a nullity.

"7. The petition of the petitioner, Marie B. Nick, is denied."

The petitioner then appealed.

By sec. 84.25 (1), Stats., the legislature empowered the State Highway Commission to designate heavily traveled public highways as controlled-access highways in the interest of public safety, convenience, and the general welfare. Subject to judicial review, when the commission so acts in such interest its action is an employment of the police power of the state. Nevertheless, appellant contends this exercise entitles her to compensation.

An impairment of the use of property by the exercise of police power, where the property itself is not taken by the state, does not entitle the owner of such property to a right to compensation. The law on this subject remains as we stated it in *State ex rel. Carter v. Harper* (1923), 182 Wis. 148, 153, 196 N. W. 451,—a zoning case,

> " . . . incidental damage to property resulting from governmental activities, or laws passed in the promotion of the public welfare, is not considered a taking of the property for which compensation must be made."

The situation here bears a close analogy to the enactment and the effect of a zoning statute.

In *Carazalla v. State* (1955), 269 Wis. 593, 608b, 70 N.W. (2d) 208, 71 N.W. (2d) 276,—a controlled-access highway case—we approved the conclusion of text writers that if no land is taken for the converted highway but the abutting landowner's access to the highway is merely made more circuitous, no compensation should be paid, and our decision embodied that principle. As recently as March 3, 1961, the *Carazalla Case* has been cited to that point in the controlled-access case of *Darnall v.*

State (S. D.), 108 N.W. (2d) 201, 206. The South Dakota supreme court there said:

> "While they may adversely affect an established business, relocations of a highway, prohibitions against crossing it or against left and U turns, the designation of one-way streets and other similar restrictions and regulations have been upheld as proper exercises of the police power of the state and not of the power of eminent domain. As such they are not compensable."

Neither in 1951 nor thereafter, in establishing Highway 30 as a controlled-access highway, did the state, through its highway commission, take any portion of Reinders' land. No doubt the control of his access to Highway 30 impaired the value of his land, the impairment increasing as any part of the land lay distant from Calhoun road, but at the time of the commission's declaration Reinders still had access in every part of his land to Highway 30 via use of Calhoun road. His access to the highway is made more circuitous but no part of Reinders' land was taken. The diminution in its value due to the exercise by the state of its police power in making Highway 30 a controlled-access highway is not recoverable. *Carazalla v. State, supra.*

The situation regarding the question of damages was frozen when the commission declared Highway 30 a controlled-access highway. To the extent that Reinders' access to Highway 30 from any part of his land is controlled, his grantee takes subject to the existing control, exactly as a purchaser of real estate which has already been zoned for restricted use is limited by the zoning. Before the conveyance Reinders had no right to be compensated for the diminished value of his land. It must be apparent that no right of compensation was created

by fractional changes of ownership when no such right pertained to ownership of the whole.

The parties submitted the issues to the trial court upon briefs and on a stipulation that the controlling facts were in the record. This stipulation does not touch the amount of damages, if petitioner is entitled to any damages, nor does it touch the suitability of access to Highway 30 by way of Calhoun road, nor whether the police power was properly exercised in declaring Highway 30 to be a controlled-access one. The time to review the commission's procedure and determination long since expired and those questions were not before the trial court nor before this court. The only question properly before the court is the question of whether Reinders' grantee, the petitioner, has a right to compensation for the restriction of direct access from her property to Highway 30. We hold that the loss in value of the land whatever it may be, is not recoverable.

Therefore, we conclude that the trial court was correct in dismissing the petition to proceed with a determination of the amount of damages caused by the designation of Highway 30 as a controlled-access highway.

By the Court.—Order affirmed.

CURRIE, J. *(concurring).* I concur fully in the able opinion of the court by Mr. Justice BROWN. The sole reason for attempting to write anything further on the matter is because of the conflict which exists in other jurisdictions on the question of whether a state, or instrumentality thereof, may constitutionally exercise the police power to extinguish all direct-access rights of an abutting landowner to an existing highway in a situation where he can reach such highway from his land by a

more-circuitous route, such as by use of a frontage road or a connecting highway.

Cases holding that the police power cannot be so exercised are *State ex rel. Morrison v. Thelberg* (1960), 87 Ariz. 318, 350 Pac. (2d) 988; *People v. Ricciardi* (1943), 23 Cal. (2d) 390, 144 Pac. (2d) 799;[1] *Florida State Turnpike Authority v. Anhoco Corp.* (Fla. 1959), 116 So. (2d) 8; *In re Easement for Highway Purposes* (1952), 93 Ohio App. 179, 112 N.E. (2d) 411, appeal dismissed, 158 Ohio St. 285, 109 N.E. (2d) 3. See also Anno. 43 A. L. R. (2d) 1072, 1077. As far as decided cases go, the foregoing cited cases seem to express the weight of authority.

Cases which are in accord with our determination in the instant case are *Gilmore v. State* (1955), 208 Misc. 427, 143 N. Y. Supp. (2d) 873, 883; *Stock v. Cox* (1939), 125 Conn. 405, 6 Atl. (2d) 346, (by dictum; and *Nichols v. Commonwealth* (1954), 331 Mass. 581, 121 N.E. (2d) 56 (by way of implication).

In *Stock v. Cox, supra,* the state was required to pay compensation for the temporary taking of all access rights, but the Connecticut court went on to say that a permanent provision for alternate access would negate the requirement of compensation.

The court in *Nichols v. Commonwealth, supra,* construed the Massachusetts statute as requiring compensation to be paid for interfering with access rights under the state's limited-access highway statute in a situation where the property had other access by means of another

[1] This holding in *People v. Ricciardi, supra,* has been criticized in Freeways and the Rights of Abutting Owners, 3 Stanford Law Review (1951), 298, 306; and Clarke, The Limited-Access Highway, 27 Washington Law Review (1952), 111, 125.

abutting highway. The court held that the legislature is not limited in providing compensation damages, which the landlord owner is entitled to receive as a matter of constitutional right, but may extend compensation to instances where the exercise of eminent domain would result in a real hardship if he were deprived of compensation. Thus, by implication the court held that in requiring compensation under the facts of that particular case it had gone beyond constitutional requirements.

The question, of whether access rights constitute property, so that a failure to pay for a substantial interference therewith as a result of the exercise of the police power would constitute a taking of property without due process of law, was before the United States supreme court in *Martin v. Creasy* (1959), 360 U. S. 219, 79 Sup. Ct. 1034, 3 L. Ed. (2d) 1186. However, over the objection of Mr. Justice DOUGLAS that court decided the case on other grounds.

Courts which hold that compensation must be paid to the abutting landowner in all cases where all direct-access rights to an existing highway are barred by statute, even though indirect access exists by means of service roads or connecting highways, consider that access rights constitute property distinct and apart from the land to which they appertain. The writer of this opinion believes this to be erroneous and that highway-access rights are but one of a bundle of rights which appertain to a parcel of real estate.[2]

Zoning legislation enacted in the interest of the general welfare may have the effect of extinguishing one

[2] For an exposition of this view, see Limited-Access Highways: Public Interest v. Access Rights of Abutting Owners, 1959 Washington University Law Quarterly, 310, 315, 316.

or more of the rights embraced in the entire bundle without the necessity of the state or municipality paying compensation to the landowner. In case of zoning enactments the test employed is whether, viewing the property as a whole, there has in reality been a taking without compensation in that confiscation of the property has in effect occurred by depriving the owner of all beneficial use of his property. 101 C. J. S., Zoning, p. 748, sec. 37; *Nardi v. Providence*, (R. I. 1959), 153 Atl. (2d) 136. Likewise, where all direct-access rights to a highway from a particular parcel have been barred by legislation enacted under the police power, the effect on the parcel as a whole should be considered in determining whether there has been a taking which requires the payment of compensation. If by reason of providing a frontage road, or the existence of a previously existing connecting highway, there is reasonable access to the controlled-access highway, no taking requiring compensation should be held to have occurred.[3]

I am authorized to state that Mr. Justice DIETERICH concurs herein.

The following opinion was filed October 6, 1961:

PER CURIAM (*on motion for rehearing*). On reaching petitioner's motion for rehearing this court requested the parties to submit briefs on the following questions:

"1. If the said denial of access was arbitrary or capricious, would petitioner be entitled to seek an award of damages in the instant proceeding?

[3] Frank M. Covey, Jr., in his article "Rights of Access and the Illinois Highway Program," 47 Illinois Bar Journal (1959), 634, 645, 646, presents a convincing argument why no compensation should be paid in a situation where a frontage road has been provided which affords indirect access to the controlled-access highway. See also Robert R. Bowie, Limiting Highway Access, 4 Maryland Law Review (1940), 219, at pages 243 *et seq.*

"2. In what type of proceeding, other than the instant proceeding, could petitioner have sought judicial review of said denial?"

Both parties submitted briefs. Both conceded that if the denial of access was arbitrary and capricious the decision of the administrative agency would be void, her rights would not be affected by the denial, and petitioner would not be entitled to any damages.

Sec. 227.15, Stats., and the sections immediately following provide for judicial review of administrative decisions. Respondent submits that such review is available to this appellant and the remedy so provided is the exclusive remedy. Appellant acknowledges that she may have this remedy but it will not produce any money in compensation for the property rights which she alleges have been seized; wherefore she submits that she may substitute another remedy better adapted to her desire.

We hold that the relief of judicial review of the administrative decision provided by statute is the exclusive remedy, with right of appeal from the reviewing court to the supreme court, per sec. 227.21, Stats. Appellant did not exhaust her remedy of judicial review. The circuit court correctly dismissed appellant's proceeding for other relief.

Motion for rehearing denied without costs.

Office-Supreme Court, U.S.
FILED
MAR 11 19
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 843

MARIE B. NICK,

Petitioner,

vs.

STATE HIGHWAY COMMISSION OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE THOMPSON
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Deputy Attorney General

A. J. FEIFAREK
Assistant Attorney General

Attorneys for State Highway Commission of Wisconsin

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin (App. A of Petition), is reported at 21 Wis. (2d) 489. The opinion of the Circuit Court for Dane County, Wisconsin, is unreported (App. B, infra., pp. 26-29). The Order of the State Highway Commission denying petitioner's application for a driveway is unreported and is printed in (App. C, infra, pp. 30-32). The opinion of the Supreme

Court of the State of Wisconsin being a companion case, is printed in (App. D, infra, pp. 33-41) and reported at 13 Wis. (2d) 511.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. May the federal law declare the right of access of owners abutting highways?
2. Did the right of access, which the petitioner alleges has been taken, exist?
3. Has the petitioner been deprived of her property without due process of law?

STATUTES INVOLVED

Wisconsin Statutes:

"84.25 Controlled-access highways. (1) AUTHORITY OF COMMISSION; PROCEDURE. The legislature declares that the effective control of traffic entering upon or leaving intensively traveled highways is necessary in the interest of public safety, convenience and the general welfare. The commission is authorized to designate as controlled-access highways the rural portions of the state trunk system on which, after traffic engineering surveys, investigations and studies, it shall find, determine and declare that the average traf-

fic potential is in excess of 2,000 vehicles per 24-hour day. Such designation of a portion of any state trunk highway in any county as a controlled-access highway shall not be effected until after a public hearing in the matter shall have been held in the county courthouse or other convenient public place within the county following notice by publication once each week for 3 successive weeks in a newspaper published in the county, or if there be none, in a newspaper having general circulation in the county. If the commission shall then find that the average traffic potential is as provided by this subsection, and that the designation of the highway as a controlled-access highway is necessary in the interest of public safety convenience and the general welfare, it shall make its finding, determination and declaration to that effect, specifying the character of the controls to be exercised. Copies of the finding, determination and declaration shall be recorded with the register of deeds, and filed with the county clerk, and published in the newspaper in which the notice of hearing was published, and the order shall be effective on such publication. Not more than 1,500 miles of highway shall be designated as controlled-access highways under authority of this section.

"(2) CONTROLLED-ACCESS HIGHWAY DEFINED. For the purposes of this section, a controlled-access highway is a highway on which the traffic is such that the highway commission has found, determined and declared it to be necessary, in the interest of the public safety, convenience and the general welfare to prohibit entrance upon and departure from the highway or street except at places specially designated and provided for such purposes, and to exercise special controls over traffic on such highway or street.

"(3) CONSTRUCTION; OTHER POWERS OF COMMISSION. In order to provide for the public safe-

ty, convenience and the general welfare, the commission may use an existing highway or provide new and additional facilities for a controlled-access highway and so design the same and its appurtenances, and so regulate, restrict or prohibit access to or departure from it as the commission may deem necessary or desirable. The commission may eliminate intersections at grade of controlled-access highways with existing highways or streets, by grade separation or service road, or by closing off such roads and streets at the right-of-way boundary line of such controlled-access highway and may divide and separate any controlled-access highway into separate roadways or lanes by raised curbings, dividing sections or other physical separations or by signs, markers, stripes or other suitable devices, and may execute any construction necessary in the development of a controlled-access highway including service roads or separation of grade structures.

"(4) CONNECTIONS BY OTHER HIGHWAYS. After the establishment of any controlled-access highway, no street or highway or private driveway, shall be opened into or connected with any controlled-access highway without the previous consent and approval of the commission in writing, which shall be given only if the public interest shall be served thereby and shall specify the terms and conditions on which such consent and approval is given.

"(5) USE OF HIGHWAY. No person shall have any right of entrance upon or departure from or travel across any controlled-access highway, or to or from abutting lands except at places designated and provided for such purposes, and on such terms and conditions as may be specified from time to time by the commission.

"(6) ABUTTING OWNERS. After the designation of a controlled-access highway, the owners or occu-

pants of abutting lands shall have no right or easement of access, by reason of the fact that their property abuts on the controlled-access highway or for other reason, except only the controlled right of access and of light, air or view.

"(7) SPECIAL CROSSING PERMITS. Whenever property held under one ownership is severed by a controlled-access highway, the commission may permit a crossing at a designated location, to be used solely for travel between the severed parcels, and such use shall cease if such parcels pass into separate ownership.

"(8) RIGHT OF WAY. Any lands or other private or public property or interest in such property needed to carry out the purposes of this section may be acquired by the highway commission in the manner provided in section 84.09.

"(9) CO-OPERATIVE AGREEMENTS. To facilitate the purposes of this section, the commission and the governing bodies of a city, county, town or village are authorized to enter into agreements with each other or with the federal government respecting the financing, planning, establishment, improvement, maintenance, use, regulation or vacation of controlled-access highways or other public ways in their respective jurisdictions.

"(10) LOCAL SERVICE ROADS. In connection with the development of any controlled-access highway, the commission and county, city, town or village highway authorities are authorized to plan, designate, establish, use, regulate, alter, improve, maintain, or vacate local service roads and streets or to designate as local service roads and streets any existing roads or streets, and to exercise jurisdiction over local service roads in the same manner as is authorized over controlled-access highways under the provisions of this

section, if, in their opinion, such local service roads or streets shall serve the necessary purposes.

"(11) COMMERCIAL ENTERPRISES. No commercial enterprise shall be authorized or conducted within or on property acquired for or designated as a controlled-access highway.

"(12) UNLAWFUL USE OF HIGHWAY; PENALTIES. It shall be unlawful for any person to drive any vehicle into or from a controlled-access highway except through an opening provided for that purpose. Any person who violates this provision shall be punished by a fine of not more than $100 or by imprisonment for not more than 30 days, or by both such fine and imprisonment.

"(13) VACATING. A controlled-access highway shall remain such until vacated by order of the state highway commission. The discontinuance of all state trunk highway routings over a highway established as a controlled-access highway shall summarily vacate the controlled-access status of such section of highway only after a traffic engineer survey investigation and study finds, determines and declares that the vacating of the controlled-access status is in the public interest. Such vacating shall not be effected until after a public hearing is held in the county court house or other convenient place within the county, following notice by publication as provided in sub. (4). The state highway commission shall record formal notice of any vacation of a controlled-access highway with the register of deeds of the county wherein such highway lies."

Administrative Procedure and Review

"227.15 Judicial review; orders reviewable. Administrative decisions, which directly affect the legal

rights, duties or privileges of any person, whether affirmative or negative in form, except the decisions of the department of taxation, the commissioner of banks and the commissioner of savings and loan associations, shall be subject to judicial review as provided in this chapter; but if specific statutory provisions require a petition for rehearing as a condition precedent, review shall be afforded only after such petition is filed and determined.

"227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in section 227.15 and directly affected thereby shall be entitled to judicial review thereof as provided in this chapter. Proceedings for review shall be instituted by serving a petition therefor personally or by registered mail upon the agency or one of its members or upon its secretary or clerk, and by filing such petition in the office of the clerk of the circuit court for Dane county (unless a different place of review is expressly provided by law), all within 30 days after the service of the decision of the agency upon all parties as provided in section 227.14 or in cases where a rehearing is requested within 30 days after service of the order finally disposing of the application for such rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The petition shall state the nature of the petitioner's interest, the fact showing that petitioner is aggrieved and directly affected by the decision, and the ground or grounds specified in section 227.20 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving the same as petitioner and the name of the agency whose

decision is sought to be reviewed as respondent, except that in petitions for review of decisions of the board of tax appeals or of the banking review board, the consumer credit review board or the credit union review board, or of the savings and loan advisory committee, the department of taxation or the commissioner of banks or the commissioner of savings and loan associations, as the case may be, shall be the named respondent. Copies of the petition shall be served, personally or by registered mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made; and for the purpose of such service the agency upon request shall certify to the petitioner the names and addresses of all such parties as disclosed by its records, which certification shall be conclusive. The agency (except in the case of the board of tax appeals and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan advisory committee) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court, in its discretion, may permit other interested persons to intervene.

"(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance stating his position with reference to the affirmance, vacation or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the named respondent and the attorney-general, and shall be filed, together with proof of required service thereof, with the clerk of the reviewing court within 10 days after

such service. Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as herein provided or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.

"227.17 Stay of proceedings. The institution of the proceeding for review shall not stay enforcement of the agency decision; but the reviewing court may order a stay upon such terms as it deems proper, except as otherwise provided in sections 189.25 and 196.43.

"227.18 Record on review. Within 30 days after service of the petition for review upon the agency, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceedings in which the decision under review was made, including all pleadings, notices, testimony, exhibits, findings, decisions, orders and exceptions, therein; but by stipulation of all parties to the review proceedings the record may be shortened by eliminating any portion thereof. Any party, other than the agency, refusing to stipulate to limit the record may be taxed by the court for the additional costs. The record may be typewritten or printed. The exhibits may be typewritten, photostated or otherwise reproduced, or, upon motion of any party, or by order of the court the original exhibits shall accompany the record. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

"227.19 Additional evidence; trial; motion to dismiss; amending petition. (1) If before the date for trial, application is made to the circuit court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the

additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency upon such terms as the court may deem proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court the additional evidence together with any modified or new findings or decision.

"(2) Proceedings for review of administrative agency decisions as provided in this chapter may be brought on for trial or hearing at any time upon not less than 10 days' notice given after the expiration of the time for service of the notices provided in section 227.16 (2).

"(3) Within 20 days after the time specified in section 227.16 for filing notices of appearance in any proceeding for review, any respondent who has served such notice may move to dismiss the petition as filed upon the ground that such petition, upon its face, does not state facts sufficient to show that the petitioner named therein is aggrieved and directly affected by the decision sought to be reviewed. Upon the hearing of such motion the court may grant the petitioner leave to amend the petition if the amendment as proposed shall have been served upon all respondents prior to such hearing. If so amended the court may consider and pass upon the validity of the amended petition without further or other motion to dismiss the same by any respondent.

"227.20 Scope of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged

irregularities in procedure before the agency, testimony thereon may be taken in the court. The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being:

"(a) Contrary to constitutional rights or privileges; or

"(b) In excess of the statutory authority or jurisdiction of the agency or affected by other error of law; or

"(c) Made or promulgated upon unlawful procedure; or

"(d) Unsupported by substantial evidence in view of the entire record as submitted; or

"(e) Arbitrary or capricious.

"(2) Upon such review due weight shall be accorded the experience, technical competence and specialized knowledged of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to him shall not be foreclosed or impaired by the fact that he has applied for or holds a license, permit or privilege under such act.

"227.21 Appeals. Any party, including the agency, may secure a review of the final judgment of the circuit court by appeal to the supreme court. Such appeal shall be taken in the manner provided by law for appeals from the circuit court in other civil cases, except that the time for appeal shall be limited to 30 days from the notice of entry of the judgment."

STATEMENT

In 1951, Edward A. Reinders owned 40 acres of land at the intersection of State Trunk Highway 30 and Calhoun Road. The property had approximately 1,320 feet of frontage on State Trunk Highway 30 and approximately the same on Calhoun Road. The owner's buildings fronted on Calhoun Road. There were no driveways to State Trunk Highway 30.

The State Highway Commission of Wisconsin, 1951, declared State Trunk Highway 30 to be a controlled-access highway, pursuant to section 84.25, Wis. Stats. (Wis. App. 130).

The Commission in its findings and declaration did not authorize any access from the Reinders' property to State Trunk Highway 30. Subsequently, the Reinders made several requests for driveways, but they were all denied.

After making these requests, Reinders, in 1955, sold George Nick and Marie B. Nick, his wife, a parcel of land abutting State Trunk Highway 30. The parcel of land fronted only on State Trunk Highway 30 and was 330 feet wide and 250 feet deep and was approximately 990 feet east of the intersection of Calhoun Road and State Trunk Highway 30.

In 1957, George Nick made a request for a driveway which was denied. On April 15, 1960, Marie B. Nick, the surviving joint tenant, made a similar request for a driveway, which was denied. Subsequent to this denial, Marie B. Nick filed a petition in inverse condemnation, pursuant to section 32.10, Wis. Stats., requesting an appraisal of her

damages as a result of the taking of her access rights. The circuit court for Waukesha county dismissed her petition, whereupon she appealed to the supreme court of the State of Wisconsin, which affirmed the holding of the circuit court for Waukesha county (App. D).

The supreme court held that there was no taking of a property right and that any diminution in value as a result of the access control, which merely made the access more circuitous, was an exercise of the police power and not a taking of property for which compensation must be made. The court further held that the Nicks' took title, subject to the existing control of access, exactly as a purchaser of real estate takes, subject to zoning. Reinders' had no right to be compensated for the restriction of access to Highway 30, and therefore, no right of compensation was created by fractional changes of ownership.

On rehearing, the supreme court held that the relief of judicial review of the administrative decision, provided by section 227.15, Wis. Stats., is the exclusive remedy of the petitioner (App. D).

Petitioner thereupon again applied for a driveway. In the application, petitioner requested that a driveway not be denied without a hearing. The Highway Commission denied the request for the driveway and the request for the hearing (App. C).

The petitioner appealed the administrative decision to the circuit court for Dane County, pursuant to section 227.15, Wis. Stats. The circuit court upheld the order of the State Highway Commission, holding that the petitioner's application for a driveway is an attempt to acquire a

new right and not to protect an existing property right (App. B). The petitioner thereupon appealed the decision of the circuit court for Dane County to the Supreme Court of the State of Wisconsin. The Supreme Court affirmed the judgment of the circuit court for Dane County (App. A).

The petitioner brought this writ asking that the decision be reviewed on the basis that the petitioner has been deprived of property without due process of law and that her property was taken for public use without just compensation.

ARGUMENT

I. The State courts have the authority to declare the access rights of an owner of land abutting on public highways

The court has previously ruled on the question of access in the case of *Sauer v. City of New York* (1907) 206 U. S. 536, 548,

> ". . . The same law which declares the easements defines, qualifies and limits them. Surely such questions must be for the final determination of the state court. It has authority to declare that the abutting land-owner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement. The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle. The courts have modified or overruled their own decisions, and

each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various States to a uniform rule which it shall announce and impose. Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was not property taken, we hold that no violation of the Fourteenth Amendment is shown."

The right of access in Wisconsin is governed by statute, as well as by court decisions. It changes with the type of highway that a property owner may abut. As an example, the right of access to a town road is different from that of a state trunk highway, and the right of access to the interstate is further limited by statute.

As pointed out by the court in the *Sauer* case, *supra*, an attempt to define a uniform rule would be difficult, because, even in the State of Wisconsin, the right varies with the type of highway.

II. The Right of Access claimed by the Petitioner did not exist

The extent of the access rights of a landowner abutting a highway are defined by State law. The Wisconsin supreme court has defined those rights and has held that the petitioner has no right of direct access to State Trunk Highway 30 (App. D). The restriction of direct access to

State Trunk Highway 30 by the police power, pursuant to section 84.25, Wis. Stats., is not a taking of property. Therefore, there is no taking of property without just compensation and no violation of the Fifth Amendment.

The Wisconsin supreme court handed down the case of *Stefan Auto Body v. State Highway Commission* (1963), 21 Wis. (2d) 363, on the same day as it handed down the decision in the case at bar. The court referred to its decision in the petitioner's original case before the court, and, in effect, affirmed its holding that the petitioner did not have the right of access which she alleges has been taken without just compensation.

The court, at page 371, said:

> "It is argued by the defendant that as long as the plaintiff has access to the interstate highway by a system of public roads his right of access is not impaired unreasonably. This argument proceeds on the theory the abutting property owner is merely entitled to some physical access to the public highway system. In this case that is true only to the extent to which the indirect access by the frontage road to the new or existing road is considered reasonable. However, the limited-right-of-way concept finds some basis in prior decisions of this court in what is called the circuity-of-travel doctrine. This idea was advanced in the early case of *Chicago & N. W. R. Co. v. Railroad Comm.* (1918), 167 Wis. 185, 167 N. W. 266. That case involved the vacating of several streets in a city to eliminate at-grade crossings and the substitution therefor of an overhead crossing. The circuity of travel was not held to be a compensable item of damages. In *Carazalla v. State* which involved a taking of land for the construction of a new highway across the plaintiff's land leaving

the old highway intact to which the plaintiff has access rights, we held no compensation should be paid because the abutter's access to the new highway was circuitous. In *Nick v. State Highway Comm.* (1961), 13 Wis. (2d) 511, 109 N. W. (2d) 71, which involved Highway 30 as a limited controlled-access highway, we said, page 514, relying on a zoning case, 'An impairment of the use of property by the exercise of police power, where the property itself is not taken by the state, does not entitle the owner of such property to a right to compensation,' and held the diminution of value of land because the access to the highway was made more circuitous was not compensable. The question of the reasonableness or the suitability of the access to Highway 30 by way of another public road abutting the property was not raised.

"In the concurring opinion it was stated, page 518, 'If by reason of providing a frontage road, or the existence of a previously existing connecting highway, there is reasonable access to the controlled-access highway, no taking requiring compensation should be held to have occurred.' The *Nick-Case* involved the police power under sec. 84.25, Stats., relating to a controlled-access highway; the instant case is concerned with sec. 84.29, relating to the national system of interstate highways. * * *"

III. Due Process of Law does not require a hearing in an attempt to acquire a new right

The statutes of the State of Wisconsin set up the procedure for declaring a highway a controlled-access highway (Sec. 84.25, Wis. Stats.) and also set up the procedure to review the administrative decision of the State Highway Commission (Sec. 227.15 to 227.21, Wis. Stats.). If the

procedures are properly followed by the State Highway Commission, and the property owners do not take advantage of the method to review the administrative decision of the Commission, the property owner cannot later claim that his property was taken without due process of law. The law has long recognized statutes of limitations, and due process of law does not require the continuing, dormant right to challenge the propriety of an administrative order.

Section 84.25 (4) and (5), Wis. Stats., provides there shall be no connections with a controlled-access highway without the approval of the Commission in writing and on such terms and conditions as may be specified from time to time by the Commission. The controlled-access order specifically provides as follows (Wis. App. 132):

> "(4) After the effective date of publication of this Finding, Determination and Declaration, no street or highway or private driveway or service crossing shall be opened into or connected with the controlled-access highway without the written consent and approval of the Commission, which shall be given if the public interest shall be served thereby, and shall specify the terms and conditions on which such consent and approval is given."

The Wisconsin court held that in 1961, when the State Highway Commission declared State Trunk Highway 30 to be a controlled-access highway, the Commission had a right to deny the Reinders' property access to State Trunk Highway 30 because of the alternate access by Calhoun Road. The subsequent conveyance to George and Marie

B. Nick does not change the status of this controlled-access order.

Section 84.25 (4), Wis. Stats., further provides that the Commission shall give additional access only if the public interest will be served thereby. The Wisconsin supreme court determined that this is a legislative question and does not require a hearing to make this determination in the absence of allegations of fraud or corruption on the part of the Highway Commission. Therefore, due process does not require a hearing and the Wisconsin statutes do not provide for a hearing.

SUMMARY

The petitioner does not have the property right she alleges. Her right of access to State Trunk Highway 30 has been restricted by a reasonable exercise of the police power. The petitioner has access to State Trunk Highway 30, although it is more circuitous. Therefore, there has been no taking of property without just compensation.

Due process does not require a hearing when there is no property right to be protected. The State Highway Commission followed all of the steps provided by statute in exercising its police power, and therefore the petitioner

was not deprived of any property without due process of law.

Respectfully submitted.

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